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ASSENT TO CONTRACT UNDER MISTAKE AS TO OFFEROR'S IDENTITY. — Peculiar situations of fact often present difficult questions as to the existence of the mutual assent necessary to the formation of a contract. Suppose that A in the presence of X represents himself as B, a man of recognized credit, and X, believing that he is negotiating with B, accepts A's offer for a contract. The Massachusetts court has held that, under these circumstances, a contract is formed, though it is voidable as between the parties. *Edmunds v. Merchants' Despatch, etc., Co.*, 135 Mass. 283. Suppose on the other hand that A makes the offer by letter, representing himself as B, and X accepts by mail. On substantially this state of facts the House of Lords has decided that no contract arises. *Cundy v. Lindsay*, 3 App. Cas. 459. The writer of a recent article agrees with the Massachusetts decision, but regards the English case as inconsistent with it. *Mutual Assent in Contracts*, by Clarence D. Ashley, 3 Colum. L. Rev. 71 (Feb., 1903). Dean Ashley contends that in both cases X assents to a contract with A. He argues from the initial position that where A is actually in the presence of X, the latter clearly intends to contract with the personality before him, and that accordingly a contract is formed with that personality. He then puts a series of cases, supposing first that a board partition had concealed A from X during their conversation, next that the communication had been by telephone, then by telegraph, and lastly by letter. "In each case," he says, "the intention is to communicate with the personality operating the voice, the telephone, the telegraph instrument or the pen that writes the letter."

In discussing mutual assent it must be recognized at the outset that the expressed and not the secret intent of the parties is to govern. The question of interpretation is thus clearly stated by Mr. Justice Holmes: "We ask, not what this man meant, but what these words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used." 12 HARV. L. REV. 417. Applying this test to the facts of the cases under consideration, one notes that X evinces an intention to contract with but one person. To this person he evidently gives two attributes: that of being the person who made the offer, and that of being B, the man of good credit. These attributes, however, do not in fact co-exist in the same person, but each describes a distinct individual. To determine which of these individuals is in reality the one with whom X intends to contract, it is necessary to ascertain which of the attributes would under the circumstances naturally be foremost in his mind, and which subsidiary. Is his attitude "I accept the proposition of B, the man of credit (who has made this offer)," or is it "I accept the proposition of this offeror (who is B, the man of credit)"?

This question must be decided on the facts of each case. The Massachusetts decision seems correct. The individual before X whom he sees and hears, and to whom he talks, clearly must be considered as the personality foremost in his mind. His mistake as to identity does not prevent a contract from arising. The English case at the other extreme also appears well decided, notwithstanding the author's adverse criticism. In that case the personality of the actual offeror, A, whose pen wrote the letter would seem not to present itself to X so forcibly as that of B, the responsible business man whose name is appended to the letter as being ostensibly that of the actual offeror. A contract therefore does not arise because B, the supposed offeror, has in fact made no offer. In regard to the supposititious cases between these extremes, a difference of opinion may well exist. As the personality of the actual offeror becomes less obtrusive, that of the responsible business man, the ostensible offeror, comes into prominence. Probably, however, as long as the communication between A and X is immediate, the personality of the actual offeror should be held to predominate; and hence the line should be drawn between the telegraph operator and the letter writer. A contract would thus arise in every case put by the author except that in which the communication was by mail.

The author's disagreement with the English court would seem to be merely on a question of interpretation and not of law, and on this issue a difference of opinion is not surprising. The view of the English court, however, seems preferable. 14 HARV. L. REV. 60.